UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. DAVID VORLAND, Defendant.	No. **CR01-3024 MWB** **REPORT AND RECOMMENDATION ON MOTION TO SUPPRESS**

I. INTRODUCTION

The defendant David Vorland ("Vorland") was indicted on June 19, 2001, on charges of manufacturing methamphetamine and possession of firearms while being an unlawful user of controlled substances. (*See* Indictment, Doc. No. 1) On August 20, 2001, Vorland filed a Motion to Suppress (Doc. No. 15), together with a supporting brief (Doc. No. 16). The plaintiff (the "Government") filed its response on September 10, 2001 (Doc. No. 19). Pursuant to the Trial Scheduling and Management Order entered August 1, 2001 (Doc. No. 13), motions to suppress in this case were assigned to the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B), for the filing of a report and recommended disposition. The court has determined that the motion can be resolved without hearing or oral argument.

II. STATEMENT OF FACTS

The facts largely are not disputed. On May 18, 2001, officers of the Mason City Police Department, responding to a citizen report, discovered two trash bags in a dumpster. The bags contained materials commonly used in the manufacture of methamphetamine, including starter fluid, packaging for pseudoephedrine, lithium batteries, and plastic bottles

with tubing attached by duct tape. The trash bags also contained receipts from a Wal-Mart Store for the purchase of batteries and pseudoephedrine. The receipts were dated in April and May of 2001.[1]

Also found in one of the trash bags was a torn piece of mail addressed to "Merle T. Hanson or Current Resident," at an incomplete address of "__th St. SW" in Mason City, Iowa, zip code 50401-6339. The police checked on the name Merle T. Hanson, and discovered he had moved out of state, but previously had lived at 1800 19th Street South West, in Mason City. The police also learned David Vorland was the current resident at that address. They checked Vorland's criminal history, and learned he had two prior convictions for possession of marijuana. He was arrested on the second of those marijuana possession charges on May 12, 2000, when he was found leaving the house of an individual who later was convicted on unspecified federal narcotics charges.

Based on this information, on May 18, 2001, the police obtained a state search warrant and searched the residence at 1800 19th Street South West. They discovered materials and equipment commonly used in the manufacture of methamphetamine. They also discovered firearms and ammunition. Vorland seeks to have this evidence suppressed, arguing the warrant was not supported by probable cause, and therefore the evidence was seized in violation of the Fourth Amendment to the United States Constitution.

[1]In the affidavit in support of the search warrant, the officer recited, "These receipts were dated in April and May." Vorland argues this means the purchases could have been made in any year, not necessarily April and May of 2001. The court finds otherwise. In context, the reference obviously was to the year 2001.

III. ANALYSIS

A. Standard of Review

The United States Supreme Court has set the standard for review of a search warrant application, as follows:

> [W]e have repeatedly said that after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of *de novo* review. A magistrate's "determination of probable cause should be paid great deference by reviewing courts." *Spinelli [v. United States,]* 309 U.S. [410,] 419, 89 S. Ct. [1509,] 590[, 21 L. Ed. 2d 637 (1969)]. "A grudging or negative attitude by reviewing courts toward warrants," *[United States v.] Ventresca*, 380 U.S. [102,] 108, 85 S. Ct. [741,] 745, [13 L. Ed. 2d 684 (1965)], is inconsistent with the Fourth Amendment's strong preference for searches conducted pursuant to a warrant [and] "courts should not invalidate . . . warrant[s] by interpreting affidavit[s] in a hypertechnical, rather than a commonsense, manner." *Id.*, [380 U.S.] at 109, 85 S. Ct. at 746.
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> . . . . Reflecting this preference for the warrant process, the traditional standard for review of an issuing magistrate's probable cause determination has been that so long as the magistrate had a "substantial basis for . . . conclud[ing]" that a search would uncover evidence of wrongdoing, the Fourth Amendment requires no more. *Jones v. United States*, 362 U.S. 257, 271, 80 S. Ct. 725, 736, 4 L. Ed. 2d 697 (1960). *See United States v. Harris*, 403 U.S. 573, 577-583, 91 S. Ct. 2075, 2079-2082, 29 L. Ed. 2d 723 (1971). [FN10]
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> [FN10] We also have said that "Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants," *Ventresca, supra*, 380 U.S. at 109, 85 S. Ct. at 746. This reflects both a desire to encourage use of the warrant process by police officers and a recognition that once a warrant has been obtained, intrusion

> upon interests protected by the Fourth Amendment is less severe than otherwise may be the case.

Illinois v. Gates, 462 U.S. 213, 236-37 & n.10, 103 S. Ct. 2317 & n.10, 2331, 76 L. Ed. 2d 527 (1983).

Thus, the scope of this court's review of the search warrant in this case is limited to a determination of whether the magistrate had a "substantial basis" to issue the warrant. In conducting this review, the court is mindful that

> affidavits "are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law have no proper place in this area." *Ventresca, supra,* 380 U.S. at 108, 85 S. Ct. at 745. . . . [M]any warrants are – quite properly . . . issued on the basis of nontechnical, common-sense judgment of laymen applying a standard less demanding than those used in more formal legal proceedings.

Gates, 462 U.S. at 235-36, 103 S. Ct. at 2331. As the Supreme Court further explained:

> The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed. *Jones v. United States*, 362 U.S. [257,] 271, 80 S. Ct. [725,] 736[, 4 L. Ed. 2d 697 (1960)]. We are convinced that this flexible, easily applied standard will better achieve the accommodation of public and private interests that the Fourth Amendment requires than does [the prior legal standard].

Gates, 462 U.S. at 238-39, 103 S. Ct. at 2332. *See also United States v. Fulgham*, 143 F.3d 399, 400-01 (8th Cir. 1998) ("When we review the sufficiency of an affidavit supporting a

search warrant, great deference is accorded the issuing judicial officer. *See United States v. Day*, 949 F.2d 973, 977 (8th Cir. 1991).").

B. Probable Cause to Support the Warrant

The first question is whether there was probable cause to support the issuance of the warrant. Preliminarily, the court notes Vorland had no expectation of privacy in garbage left in a dumpster. The Fourth Amendment does not prohibit "the warrantless search and seizure of garbage left for collection outside the curtilage of a home." *California v. Greenwood*, 486 U.S. 35, 37, 108 S. Ct. 1625, 1627, 100 L. Ed. 2d 30 (1988); *United States v. Trice*, 864 F.2d 1421 (8th Cir. 1988); *United States v. Biondich*, 652 F.2d 743, 745 (8th Cir. 1981).[2]

Vorland contends the warrant application did not provide probable cause for the issuance of a warrant to search his house. He argues there was no indication of how long the trash had been in the dumpster. "For all practical purposes the trash could have been in the dumpster for weeks, months, or even years." (Doc. No. 16, p. 2) He also argues the zip code on the envelope found in the trash did not match up to the address of 1800 19 St. SW. (*Id.*) He argues further that there was no indication in the affidavit in support of the search warrant as to whether the envelope was found in the same trash bag as the items commonly used to manufacture methamphetamine. (*Id.*)

The court does not give much weight to these objections. The record establishes that the trash had been placed in the dumpster recently. The WalMart receipts for purchase of

[2]Indeed, no expectation of privacy would exist even if the trash had been within the curtilage of the home, if the trash is "readily accessible to the public so as to render any expectation of privacy objectively unreasonable." *United States v. Comeaux*, 955 F.2d 586, 589 (8th Cir. 1992); *see United States v. Deaner*, 1992 WL 209966 (M.D. Pa. 1992), *aff'd*, 1 F.3d 192 (3d Cir. 1993).

some of the items in the trash bags were dated April and May 2001[3], and the trash bags were found in May 2001. The fact that the zip code might not have match up with the rest of the address seems to be immaterial. Also, although it may be of limited significance if the envelope were in a different trash bag from some of the other items seized, it would not be determinative in making the "common sense" type of analysis required by *Gates*.

Nevertheless, the court is troubled by the adequacy of the probable cause supporting issuance of the warrant. There was very little evidence in the trash bags to link the contents to Vorland or his house. The envelope with the address of a prior occupant of Vorland's home provided only the thinnest of connections. The fact that Vorland had two prior convictions for possession of marijuana did not add appreciably to the evidence supporting issuance of the warrant. Similarly, the fact that Vorland had been arrested a year earlier while leaving the residence of someone who later was convicted on federal drug charges, with no indication of what those charges were, is not terribly significant.

The court finds the warrant application did not contain sufficient facts upon which the magistrate could determine probable cause existed. However, this does not end the inquiry. As discussed below, even a defective warrant may be overcome if the officers relied upon it in good faith.

3. Leon Analysis

If the officers executing the search warrant reasonably and in good faith relied on the warrant, then evidence obtained from the search should not be suppressed. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "Nevertheless, the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable, . . . and it is clear that in some circumstances the officer will have no reasonable grounds for believing that the

[3]*See* note 1, *supra.*

warrant was properly issued." *Id.*, 468 U.S. at 922-23, 104 S. Ct. at 3420 (citations and footnote omitted). As the United States Supreme Court noted in *Leon*:

> It is necessary to consider the objective reasonableness, not only of the officers who eventually executed a warrant, but also of the officers who originally obtained it or who provided information material to the probable-cause determination. Nothing in our opinion suggests, for example, that an officer could obtain a warrant on the basis of a "bare bones" affidavit and then rely on colleagues who are ignorant of the circumstances under which the warrant was obtained to conduct the search. [Citations omitted.]

Id., 468 U.S. at 923 n.24, 104 S. Ct. at 3420 n.24.

Thus, if serious deficiencies exist either in the warrant application itself (*e.g.*, where "the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth," *id.*, 468 U.S. at 923, 104 S. Ct. at 3421 (citing *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978)), or in the magistrate's probable cause determination, then the *Leon* good faith exception may not apply. As the *Leon* Court explained:

> Deference to the magistrate, however, is not boundless. It is clear, first, that the deference accorded to a magistrate's finding of probable cause does not preclude inquiry into the knowing or reckless falsity of the affidavit on which that determination was based. Second, the courts must also insist that the magistrate purport to "perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." A magistrate failing to "manifest that neutrality and detachment demanded of a judicial officer when presented with a warrant application" and who acts instead as "an adjunct law enforcement officer" cannot provide valid authorization for an otherwise unconstitutional search.
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> Third, reviewing courts will not defer to a warrant based on an affidavit that does not "provide the magistrate with a substantial basis for determining the existence of probable

> cause." "Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others." Even if the warrant application was supported by more than a "bare bones" affidavit, a reviewing court may properly conclude that, notwithstanding the deference that magistrates deserve, the warrant was invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances, or because the form of the warrant was improper in some respect.

Leon, 468 U.S. at 914-15, 104 S. Ct. at 3416 (internal citations omitted). The Court noted that good faith on law enforcement's part in executing a warrant "is not enough," because "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Leon*, 468 U.S. at 915 n.13, 104 S. Ct. at 3417 n.13 (citing *Beck v. Ohio*, 379 U.S. 89, 97, 85 S. Ct. 223, 228, 13 L. Ed. 2d 142 (1964), and *Henry v. United States*, 361 U.S. 98, 102, 80 S. Ct. 168, 171, 4 L. Ed. 23 134 (1959)).

In the present case, the court finds the warrant is "invalid because the magistrate's probable-cause determination reflected an improper analysis of the totality of the circumstances." *Leon*, 468 U.S. at 914, 104 S. Ct. at 3416. Nevertheless, under *Leon*, the exclusionary rule should not be applied to exclude evidence as a means of punishing or deterring an errant or negligent magistrate. The Supreme Court found that penalizing officers who act in good faith on a warrant for a magistrate's error in issuing the warrant "cannot logically contribute to the deterrence of Fourth Amendment violations." *Leon*, 468 U.S. at 921, 104 S. Ct. at 3419. The relevant question is whether law enforcement actions were objectively reasonable; *i.e.*, whether "the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment." *Leon*, 468 U.S. at 918, 104 S. Ct. at 3418. The *Leon* Court noted:

> As we observed in *Michigan v. Tucker*, 417 U.S. 433, 447, 94 S. Ct. 2357, 2365, 41 L. Ed. 2d 182 (1974), and reiterated in *United States v. Peltier*, 422 U.S. at 539, 95 S. Ct. at 2318:
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> > "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."
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> The *Peltier* Court continued, *id.* at 542, 95 S. Ct. at 2320:
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> > "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

Leon, 468 U.S. at 919, 104 S. Ct. at 3418-19.

The court cannot say the officers executing the search warrant at issue here either had knowledge, or properly could be charged with knowledge, that the warrant was not supported by probable cause. The warrant is not "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Leon*, 468 U.S. at 923, 104 S. Ct. at 3421. The court, therefore, recommends the motion to suppress be denied.

IV. CONCLUSION

For the reasons set forth above, **IT IS RECOMMENDED**, unless any party files objections[4] to the Report and Recommendation in accordance with 28 U.S.C. § 636(b)(1)(C) and Fed. R. Civ. P. 72(b), within ten (10) days of the service of a copy of this report and recommendation, that Vorland's motion to suppress be **denied**.

IT IS SO ORDERED.

DATED this 18th day of September, 2001.

PAUL A. ZOSS
MAGISTRATE JUDGE
UNITED STATES DISTRICT COURT

[4]Objections must specify the parts of the report and recommendation to which objections are made. Objections also must specify the parts of the record, including exhibits and transcript lines, which form the basis for such objections. *See* Fed. R. Civ. P. 72. Failure to file timely objections may result in waiver of the right to appeal questions of fact. *See Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 475, 88 L. Ed. 2d 435 (1985); *Thompson v. Nix*, 897 F.2d 356 (8th Cir. 1990).